



San Bernardino Associated Governments

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•San Bernardino County Transportation Commission •San Bernardino County Transportation Authority
•San Bernardino County Congestion Management Agency •Service Authority for Freeway Emergencies

SUPPLEMENTAL AGENDA ITEM

Administrative Committee Meeting

August 8, 2007
1:00 p.m.

Location

San Bernardino Associated Governments
1170 W. 3rd Street, 2nd Floor
San Bernardino, CA

Discussion Calendar

6A. Disadvantaged Business Enterprise (DBE) Race-Neutral Program

Approve amendment No. 1 to Contract 06-071, with the California Department of Transportation relative to the Disadvantaged Business Enterprise Race-Neutral Implementation with no cost implications

This item was inadvertently omitted from the agenda.

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- San Bernardino County Transportation Commission ■ San Bernardino County Transportation Authority
■ San Bernardino County Congestion Management Agency ■ Service Authority for Freeway Emergencies
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Minute Action

AGENDA ITEM:

Date: August 8, 2007

Subject: Disadvantaged Business Enterprise (DBE) Race-Neutral Program

Recommendation:* Approve amendment No. 1 to Contract 06-071, with the California Department of Transportation relative to the Disadvantaged Business Enterprise Race-Neutral Implementation with no cost implications.

Background: The California Department of Transportation (Caltrans) was required by a Ninth Circuit Court of Appeals decision, Western States Paving Co., Inc. v. Washington Department of Transportation et al. to reevaluate its Disadvantaged Business Enterprise (DBE) program to constitutionally support the use of race-conscious DBE goals. Caltrans began a review of the race-conscious DBE program in December 2005 and concluded the evaluation on May 1, 2006. During the evaluation period, Caltrans solicited evidence and comments that would provide it with information necessary to maintain a race-conscious DBE program. The type of information that was solicited included, but was not limited to, disparity studies, studies related to discrimination in the transportation contracting industry, studies documenting discriminatory barriers associated with bonding and financing DBEs, formal complaints filed by DBEs alleging discrimination and information related to the frequency in which prime contractors solicited DBEs on non-goal contracts.

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Approved
Board of Directors

Date: _____

Moved: _____ *Second:* _____

In Favor: _____ *Opposed:* _____ *Abstained:* _____

Witnessed: _____

As part of the transition to a race-neutral DBE program, each of the federal transportation assistance subrecipients, such as SANBAG, must submit a "Race-neutral DBE Implementation Agreement" formally acknowledging the local agency's responsibilities under the Caltrans race-neutral DBE Program. The Board approved Contract No. 06-071 in June 2006, but the State has since amended the Race-Neutral Implementation Agreement, requiring local agencies to amend their approved agreements with the State. The State amended the language in "Section V: Race-Neutral Means of Meeting the Annual DBE Goal" to better define "race-neutral DBE participation" and to provide additional clarity on what constitutes appropriate means of facilitating race-neutral DBE participation by federal fund recipients. This is a standard contract required by all federal fund recipients and is recommended for approval.

Financial Impact: This item has no direct impact on the adopted budget. There are significant cost implications to SANBAG associated with compliance with the Caltrans DBE requirements which would place all federal funds associated with SANBAG's projects in jeopardy. Staff activities associated with this item are consistent with the adopted budget.

Reviewed By: This contract was originally reviewed by Legal Counsel. The recommended amendment has been submitted for additional review. This item is scheduled for review by the Administrative Committee on August 8, 2007.

Responsible Staff: Ryan Graham, Transportation Planning Specialist

SANBAG Contract No. 06071-01

by and between

California Department of Transportation

and

San Bernardino Associated Governments

for

Disadvantaged Business Enterprise Race Neutral Implementation Agreement**FOR ACCOUNTING PURPOSES ONLY**

<input type="checkbox"/> Payable <input type="checkbox"/> Receivable	Vendor Contract # _____	Retention: <input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Original <input checked="" type="checkbox"/> Amendment
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Notes: This contract has no dollar amount

Original Contract: \$ 0.00

Previous Amendments Total: \$ _____

Previous Amendments Contingency Total: \$ _____

Contingency Amount: \$ _____

Current Amendment: \$ _____

Current Amendment Contingency: \$ _____

Contingency Amount requires specific authorization by Task Manager prior to release.

Contract TOTAL → \$ 0.00

Please include funding allocation for the original contract or the amendment

<u>Task</u>	<u>Cost Code</u>	<u>Funding Sources</u>	<u>Amounts</u>
1 <u>08INDI</u>	_____	1 _____	\$ <u>0.00</u>
2 _____	_____	2 _____	\$ _____
3 _____	_____	3 _____	\$ _____
4 _____	_____	4 _____	\$ _____

Original Board Approved Contract Date: 6/07/06 Contract Start: 06/07/06 Contract End: _____New Amend. Approval (Board) Date: 09/12/08 Amend. Start: 09/12/07 Amend. End: _____**If this is a multi-year contract/amendment, please allocate costs among fiscal years:**

Fiscal Year: _____ \$ _____	Fiscal Year: _____ \$ _____	Fiscal Year: _____ \$ _____
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Is this consistent with the adopted budget? ☒ Yes ☐ NoIf no, has the budget amendment been submitted? ☐ Yes ☐ No**CONTRACT MANAGEMENT****Please mark an "X" next to all that apply:**☒ Intergovernmental ☐ Private ☐ Non-Local ☐ Local ☐ Partly LocalDisadvantaged Business Enterprise: ☐ No ☐ Yes _____%Task Manager: Deborah Robinson BarmackContract Manager: Ryan Graham

Task Manager Signature

Date

Contract Manager Signature

Date

Chief Financial Officer Signature

Date

Filename: a060711.doc

08INDI

a06071-01

08INDI

**SANBAG Contract No. 06071-01
(Amendment No. 1)
by and between
California Department of Transportation
and
San Bernardino Associated Governments
for
Disadvantaged Business Enterprise Race-Neutral Implementation Agreement**

For the agency of San Bernardino Associated Governments, hereinafter referred to as
“RECIPIENT.”

I Definition of Terms

The terms used in this agreement have the meanings defined in 49 CFR § 26.5.

II OBJECTIVE/POLICY STATEMENT (§26/1. 26/23)

The RECIPIENT intends to receive federal financial assistance from the U. S. Department of Transportation (DOT) through the California Department of Transportation (Caltrans), and as a condition of receiving this assistance, the RECIPIENT will sign the California Department of Transportation’s Disadvantaged Business Enterprise Implementation Agreement (hereinafter referred to as Agreement). The RECIPIENT agrees to implement the State of California, Department of Transportation Disadvantaged Business Enterprise (DBE) Program Plan (hereinafter referred to as the DBE Program Plan) as it pertains to local agencies. The DBE Program Plan is based on U.S. Department of Transportation (DOT), 49 CFR, Part 26 requirements. It is the policy of the RECIPIENT to ensure that DBEs, as defined in Part 26, have an equal opportunity to receive and participate in DOT-assisted contracts. It is also their policy:

- To ensure nondiscrimination in the award and administration of DOT-assisted contracts.
- To create a level playing field on which DBE’s can compete fairly for DOT-assisted contracts.
- To ensure that their annual overall DBE participation percentage is narrowly tailored, in accordance with applicable law.
- To ensure that only firms that fully meet 49 CFR, Part 26 eligibility standards are permitted to participate as DBEs.
- To help remove barriers to the participation of DBEs in DOT-assisted contracts.
- To assist the development of firms that can compete successfully in the market place outside the DBE Program.

III Nondiscrimination (§26.7)

RECIPIENT will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR, Part 26 on the basis of race, color, sex, or national origin. In administering the local agency components of the DBE Program Plan, the RECIPIENT will not, directly, or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the DBE Program Plan with respect to individuals of a particular race, color, sex, or national origin.

IV Annual DBE Submittal Form (§26.21)

The RECIPIENT will provide to the Caltrans' District Local Assistance Engineer (DLAE) a completed DBE Annual Submittal Form by June 1 of each year for the following Federal Fiscal Year (FFY). This form includes an Annual Anticipated DBE Participation Level (AADPL), methodology for establishing the AADPL, the name, phone number, and electronic mailing address of the designated DBELO, and the choice of Prompt Pay Provision to be used by the RECIPIENT for the following FFY.

V Race-Neutral Means of Meeting the Annual DBE Goal (§26.51)

RECIPIENT will assist Caltrans to achieve its Overall Statewide DBE Goal by using race-neutral means of facilitating DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low-bid system to award subcontracts).

Race-neutral means include, but are not limited to, the following:

1. Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses, participation (e.g., unbundling large contracts to make them more accessible to small businesses, requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces);
2. Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing);
3. Providing technical assistance and other services;
4. Carrying out information and communication programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists of bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);
5. Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;
6. Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of types of work, handle increasingly significant projects, and achieve eventual self-sufficiency;
7. Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;
8. Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and

9. Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

VI Quotas (§26.43)

RECIPIENT will not use quotas or set-asides in any way in the administration of the local agency component of the DBE Program Plan.

VII DBE Liaison Officer (DBELO) (§26.25)

RECIPIENT has designated a DBE Liaison Officer. The DBELO is responsible for implementing the DBE Program Plan, as it pertains to the RECIPIENT, and ensures that the RECIPIENT is fully and properly advised concerning DBE Program Plan matters. [Specify resources available to the DBELO; e.g., the DBELO has a staff of two professional employees assigned to the DBE program on a full-time basis and two support personnel who devote a portion of their time to the program.] The name, address, telephone number, electronic mail address, and an organization chart displaying the DBELO's position in the organization are found in Attachment A to this Agreement. This information will be updated annually and included on the DBE Annual Submittal Form. The DBELO is responsible for developing, implementing, and monitoring the RECIPIENT's requirements of the DBE Program Plan in coordination with other appropriate officials. Duties and responsibilities include the following:

1. Gathers and reports statistical data and other information as required.
2. Reviews third party contracts and purchase requisitions for compliance with this program.
3. Works with all departments to determine projected Annual Anticipated DBE Participation Level.
4. Ensures that bid notices and requests for proposals are made available to DBEs in a timely manner.
5. Analyzes DBE participation and identifies ways to encourage participation through race-neutral means.
6. Participates in pre-bid meetings.
7. Advises the CEO/governing body on DBE matters and DBE race-neutral issues.
8. Provides DBEs with information and recommends sources to assist in preparing bids, obtaining bonding and insurance.
9. Plans and participates in DBE training seminars.
10. Provides outreach to DBEs and community organizations to fully advise them of contracting opportunities.

VIII Federal Financial Assistance Agreement Assurance (§26.13)

RECIPIENT will sign the following assurance, applicable to and to be included in all DOT-assisted contracts and their administration, as part of the program supplement agreement for each project.

The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract, or in the administration of its DBE Program, or the requirements of 49CFR Part 26. The recipient shall take all necessary and reasonable steps under 49 CFR, Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE Program, as required by 49 CFR, Part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

IX DBE Financial Institutions (§26.27)

It is the policy of the RECIPIENT to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community to make reasonable efforts to use these institutions, and to encourage prime contractors on DOT-assisted contracts to make use of these institutions. Information on the availability of such institutions can be obtained from the DBELO. The Caltrans' Disadvantaged Business Enterprise Program may offer assistance to the DBELO.

X Directory (§26.31)

RECIPIENT will refer interested persons to the Unified Certification Program DBE directory available from the Caltrans Disadvantaged Business Enterprise Program's website at www.dot.ca.gov/hq/bep.

XI Required Contract Clauses (§§26.13, 26.29)

RECIPIENT ensures that the following clauses or equivalent will be included in each DOT-assisted prime contract:

A. CONTRACT ASSURANCE

The contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR, Part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy, as recipient deems appropriate.

B. PROMPT PAYMENT

Prompt Progress Payment to Subcontractors

A prime contractor or subcontractor shall pay to any subcontractor not later than 10-days of receipt of each progress payment, in accordance with the provision in Section 7108.5 of the California Business and Professions Code concerning prompt payment to subcontractors. The 10-days are applicable unless a longer period is agreed to in writing. Any delay or postponement of payment over 30-days may take place only for good cause and with the agency's prior written approval. Any violation of Section 7108.5 shall subject the violating contractor or subcontractor to the penalties, sanctions, and other remedies of that Section. This requirement shall not be construed to

limit or impair any contractual, administrative, or judicial remedies, otherwise available to the contractor or subcontractor in the event of a dispute involving late payment or nonpayment by the contractor, deficient subcontractor performance, and/or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

Prompt Payment of Withheld Funds to Subcontractors

The local agency shall include either (1), (2), or (3) of the following provisions [local agency equivalent will need Caltrans approval] in their federal-aid contracts to ensure prompt and full payment of retainage [withheld funds] to subcontractors in compliance with 49 CFR 26.29.

1. No retainage will be held by the agency from progress payments due to the prime contractor. Prime contractors and subcontractors are prohibited from holding retainage from subcontractors. Any delay or postponement of payment may take place only for good cause and with the agency's prior written approval. Any violation of these provisions shall subject the violating contractor or subcontractor to the penalties, sanctions, and other remedies specified in Section 7108.5 of the California Business and Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies, otherwise available to the contractor or subcontractor in the event of a dispute involving late payment or nonpayment by the contractor, deficient subcontractor performance, and/or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

2. No retainage will be held by the agency from progress payments due the prime contractor. Any retainage kept by the prime contractor or by a subcontractor must be paid in full to the earning subcontractor within 30-days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment may take place only for good cause and with the agency's prior written approval. Any violation of these provisions shall subject the violating contractor or subcontractor to the penalties, sanctions, and remedies specified in Section 7108.5 of the California Business and Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies, otherwise available to the contractor or subcontractor in the event of a dispute involving late payment or nonpayment by the contractor, deficient subcontractor performance, and/or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

3. The agency shall hold retainage from the prime contractor and shall make prompt and regular incremental acceptances of portions, as determined by the agency of the contract work and pay retainage to the prime contractor based on these acceptances. The prime contractor or subcontractor shall return all monies withheld in retention from all subcontractors within 30-days after receiving payment for work satisfactorily completed and accepted including incremental acceptances of portions of the contract work by the agency. Any delay or postponement of payment may take place only for good cause and with the agency's prior written approval. Any violation of these provisions shall subject the violating prime contractor to the penalties, sanctions, and other remedies specified in Section 7108.5 of the California Business Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies, otherwise available to the contractor or subcontractor in the event of: a dispute involving late payment or nonpayment by the contractor; deficient subcontractor performance; and/or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

XIV Local Assistance Procedures Manual

The RECIPIENT will advertise, award and administer DOT-assisted contracts in accordance with the most current published Local Assistance Procedures Manual (LAPM).

XV Bidders List (§26.11)

The RECIPIENT will create and maintain a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on its DOT-assisted contracts. The bidders list will include the name, address, DBE/non-DBE status, age, and annual gross receipts of the firms.

XVI Reporting to the DLAE

RECIPIENT will promptly submit a copy of the Local Agency Bidder-DBE Information (Exhibit 15-G or Exhibit 10-O of the LAPM) to the DLAE at the time of execution of consultant or construction contract award. RECIPIENT will promptly submit a copy of the Final Utilization of DBE participation to the DLAE using Exhibit 17-F of the LAPM immediately upon completion of the contract for each consultant or construction contract.

XVII Certification (§26.83(a))

RECIPIENT ensures that only DBE firms currently certified by the California Unified Certification Program will participate as DBEs on DOT-assisted contracts.

XVIII Confidentiality

RECIPIENT will safeguard from disclosure to third parties, information that may reasonably be regarded as confidential business information consistent with federal, state, and local laws.

**SAN BERNARDINO
ASSOCIATED GOVERNMENTS:**

**DEPARTMENT OF TRANSPORTATION
DISADVANTAGED BUSINESS ENTERPRISE
PROGRAM PLAN IMPLEMENTATION**

By: _____
Lawrence E. Dale, President

By: _____
Sean Yeung, District 8 DLAE

Print Name of DLAE

APPROVED AS TO LEGAL FORM:

By: _____
Jean Rene-Basle, SANBAG Counsel